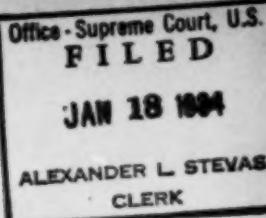


83 - 1461



No.

SUPREME COURT OF THE UNITED STATES
October Term

MIGUEL A. GARGALLO,
Petitioner,

v.

FRANKLIN COUNTY COURT OF COMMON PLEAS,
DOMESTIC RELATIONS, ET ALL.,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

**MIGUEL A. GARGALLO
P.O. Box 02177
Columbus, OH 43202
(614) 268-2349
Petitioner, Pro Se**

January 17, 1984.

QUESTION PRESENTED

Whether the federal district courts may abstain from exercising jurisdiction in a civil rights action against state officials upon the finding that the alleged misconduct of the officials aroused out of a domestic relations litigation.

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MIGUEL A. GARGALLO,
Petitioner,
v.
FRANKLIN COUNTY COURT OF COMMON
PLEAS, DOMESTIC RELATIONS, ET ALL.,
Respondents. (*)

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Miguel A. Gargallo, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on October 20, 1983.

(*) List of all the Respondents:

Franklin County Court of Common Pleas, Division of Domestic Relations; HON. JOHN W. HILL, Judge of said Court; HON. CLAYTON W. ROSE, JR., Judge of said Court; HON. WINSTON C. ALLEN, Judge of Licking County; HON. RICHARD H. FINEFROCK, Judge of Logan County; HON. GUY G. CLINE, Judge of Pickaway County;

OPINIONS BELOW

The Opinion and Order of the United States District Court and the final Order of the United States Court of Appeals for the Sixth Circuit appear in the Appendix.

(cont'd.)

Franklin County Court of Common Pleas, Criminal Division; HON. FREDERICK T. WILLIAMS, Judge of said Court;

Franklin County Municipal Court of Columbus; HON. LEO P. STARK, Judge of said Court; HON. GERVAIS W. FAIS, former Judge of said Court; HON. FRANK A. REDA, former Judge of said Court; HON. GEORGENA HOWELL, former Judge of said Court; HON. JOSEPH M. CLIFFORD, Judge of said Court;

Franklin County Court of Appeals, HON. ALBA L. WHITESIDE, Judge of said Court; HON. DEAN STRAUSBAUGH, Judge of said Court; HON. ROBERT E. HOLMES, former Judge of said Court; HON. ARCHER E. REILLY, Judge of said Court;

GEORGE C. SMITH, Franklin County Prosecuting Attorney; MARVIN S. ROMANOFF, former Franklin County Assistant prosecuting Attorney;

JAMES J. HUGHES, JR., former City Attorney; LAWRENCE A. GARLINGER, Assistant City Prosecutor;

THOMAS J. ENRIGHT, Clerk of Courts, Court of Common Pleas, RICHARD D. COE, former Deputy Clerk, Division of Domestic Relations;

JURISDICTION

On June 14, 1982, the District Court dismissed this action upon a finding of lack of jurisdiction.

Thereafter, on October 20, 1983, the Court of Appeals affirmed the District Court's order.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment
V:

"(N)or shall any person...be deprived of life, liberty, or property, without due process of law."

(cont'd.)

PHILIP R. BRADLEY, Attorney; PAUL A. SCOTT, Attorney; WILMORE BROWN, Attorney; and WILLIAM L. MILLARD, Attorney.

STATEMENT OF THE CASE

This is an action for declaratory relief and damage. The cause of action was based on 42 U.S.C. Section 1983 (civil rights action for deprivation of rights), 42 U.S.C. Section 1985(3) (conspiracy depriving persons of rights or privileges), and the Fifth Amendment to the Constitution.

The jurisdiction of the District Court was based on 28 U.S.C. Section 1333(1,2,3,4) (civil rights) and 28 U.S.C. Section 1331(a) (the amount in controversy exceeds \$10,000).

The action was commenced in the District Court, on May 29, 1979, under Case No. C-2-79-483.

The Complaint avers, under oath, that state officials of the County of Franklin, Ohio, conspired to deprive the petitioner

of his civil rights guaranteed to him under the United States Constitution.

On motions by these state officials, the District Court dismissed the action upon lack of jurisdiction. The Court of Appeals then affirmed the District Court's Order of dismissal.

This petition seeks the reversal of these orders.

REASONS FOR GRANTING THE WRIT

The decision rendered by the Sixth Circuit Court of Appeals is in conflict with the decision rendered by the Fourth Circuit Court of Appeals, on the same matter.

In Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980), where former husband brought action against state officials (and former wife) for alleged malicious prosecution, abuse of process, conversion, and

conspiracy, the district court dismissed the action for lack of jurisdiction. On appeal, however, the Fourth Circuit Court of Appeals reversed and remanded the action to the lower court, stating that:

"The structure of the asserted actions is such that they do not require the existence of any rule particularly marital in nature as a substantial ingredient to give them vitality." P. 1089.

It is also worth mentioning that all other potential court resorts to petitioner are exhausted.

THE FEDERAL QUESTION INVOLVED IS OF GREAT PUBLIC IMPORTANCE AND CONCERN

The decisions below, by their stare decisis effects, threaten the constitutional rights of all the persons residing within the jurisdiction of the 6th Circuit Court of Appeals. It is noted, however, that those residing within the jurisdiction of the 4th Circuit Court of

Appeals are duly assured of such constitutional rights.

We believe that this Court should grant this petition so that the central question be fully briefed, argued, and decided; and the conflict between the two Circuit Courts jurisdiction be settled.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

MIGUEL A. GARGALLO
P.O. Box 02177
Columbus, OH 43202
(614) 268-2349
Petitioner, Pro Se

January 17, 1984.

APPENDIX

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**Filed:
Jun. 14, 1982**

MIGUEL A. GARGALLO

Plaintiff

vs.

**Civil Action
C-2-79-483**

**FRANKLIN COUNTY COURT OF
COMMON PLEAS, et al.,**

Defendants.

OPINION AND ORDER

Plaintiff alleges in this complaint under 42 U.S.C. Section 1983³ that the defendants subjected him to sexual discrimination during the course of his divorce proceedings. Named as defendants are the Franklin County Court of Common Pleas, Division of Domestic Relations; the

Franklin County Court of Common Pleas,
Criminal Division; the Franklin County
Municipal Court of Columbus; the Franklin
County Court of Appeals; several judges
from the above named courts; Judge Allen
of the Licking County Court of Common
Pleas; the former Franklin County prose-
cuting attorney and an assistant prose-
cuting attorney; the former city attorney
and assistant city attorney; the Clerk of
Court for the Franklin County Court of
Common Pleas and a deputy clerk; and four
private attorneys, Philip Bradley, Paul
Scott, Wilmore Brown and William Millard.
Plaintiff has already litigated at least
two prior actions concerning his divorce
proceedings. See, Gargallo v. Gargallo,
472 F.2d 1219 (6th Cir.) cert. denied,
414 U.S. 805 (1973); Gargallo v. Gargallo,
487 F.2d 914 (6th Cir. 1973).

The defendant Franklin County courts and judges move to dismiss this complaint for lack of jurisdiction and failure to state a claim for relief. The same grounds for dismissal are asserted by the Franklin County Clerk of Court and the former prosecuting attorney. Judge Allen Pleas moves to dismiss the complaint on the basis of judicial immunity. Attorney Philip Bradley moves to dismiss this action for lack of jurisdiction and failure to state a claim for relief, or in the alternative, he moves for a more definite statement. Attorney Paul Scott moves to dismiss it on the ground that this action is barred by the applicable statute of limitations. Attorneys Brown and Millard move to dismiss the complaint for lack of jurisdiction and failure to state a claim

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for relief. Former City Attorney James Hughes moves to dismiss it for lack of jurisdiction and on the basis of prosecutorial immunity, and in the alternative, he moves for summary judgment.

The Court will first address the issue of jurisdiction. Defendants contend in their various motions that plaintiff is essentially alleging a domestic relations action, seeking to relitigate the domestic relations proceedings that occurred in the state courts. They argue that this court does not have subject matter jurisdiction over this action even though the plaintiff has attempted to raise a federal question.

The United States Court of Appeals for the Sixth Circuit held in Firestone v. The Cleveland Trust Company, 654 F.2d 1212, 1215 (6th Cir. 1981), that:

Even when brought under the guise of a federal question action, a suit whose substance is domestic relations will not be entertained in a federal court.

In such a situation, "[i]t is incumbent upon the district court to sift through the claims of the complaint to determine the true character of the dispute to be adjudicated." Id. If the suit essentially concerns a domestic relations matter, then the federal court must dismiss it for lack of subject matter jurisdiction. See also, Gargallo v. Gargallo, supra; Hernstadt v. Hernstadt, 373 F.2d 316 (6th Cir. 1967); Wilkins v. Rogers, 581 F.2d 399 (4th Cir. 1978).

The Court has carefully read and considered this rather long and discursive complaint and concludes that it is essentially alleging a domestic relations matter. The complaint recounts the exten-

sive litigation involved in plaintiff's divorce proceedings, and details various errors on the parts of the defendant courts and judges. It alleges that plaintiff's attorneys made mistakes handling the suit. The complaint further alleges that the defendants conspired to have plaintiff prosecuted for a misdemeanor offense and then a felony offense, but that the charge was later dropped. And the complaint generally alleges that throughout the course of this litigation, plaintiff was subjected to sexual discrimination because he was a man.

It is apparent that plaintiff wishes to re-litigate his state divorce proceedings in the present action. The broad, conclusory assertion that plaintiff was subjected to discrimination because he was a man does not save the com-

plaint. This complaint essentially concerns a domestic relations dispute, and consequently this Court lacks subject matter jurisdiction over the action.

Firestone v. The Cleveland Trust Company, supra. Accordingly, defendants' motion to dismiss is meritorious; and, therefore, it is GRANTED.

Moreover, since the judges were acting in a judicial capacity at all times relevant to the allegations in the complaint and they all were acting within their general jurisdiction, the Court finds that the defendant judges are protected from the claims for money damages by judicial immunity. Stump v. Sparkman, 435 U.S. 349, 359-360 (1978); Pierson v. Ray, 386 U.S. 547 (1967); Castorr v. Brundage, F.2d (6th Cir. March 23, 1982). Similarly, since the prosecuting attorneys,

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the Franklin County prosecutor and the city attorney and their assistants, acted within a judicial function in prosecuting plaintiff for the non-support offense, they are protected by prosecutorial immunity. Imbler v. Pachtman, 424 U.S. 409, 431 (1976); Macko v. Bryon, 641 F.2d 447, 449 (6th Cir. 1981).

Attorney Paul Scott's motion to dismiss because the suit against him is barred by the statute of limitations is meritorious. Since Section 1983 does not have a statute of limitations, a federal district court must apply the statute of limitations of the state where it sits which would apply to the most closely analogous state action. Carmicle v. Widdle, 555 F.2d 554, 555 (6th Cir. 1977); ^D Austin v. Brammer, 555 F.2d 142 (6th Cir. 1977).

Plaintiff alleges that defendant Scott subjected him to sex discrimination through his actions during the litigation and that he acted in concert with the others to have criminal charges brought against him. These allegations are most closely analogous to a personal injury action or malicious prosecution. Under Section 2305.10, Ohio Revised Code, a personal injury action has a two year statute of limitations, and under Section 2305.11, malicious prosecution has a one year statute of limitations. Since the averments in the complaint concern Scott's actions in 1975 at the latest, applying either of Ohio's applicable statutes of limitations, this action, which was filed May 29, 1979, is barred by the statute of limitations.

Defendants Hughes and Garlinger, the former city attorney and assistant city

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prosecutor, move for summary judgment based upon the statute of limitations. The only allegations about them concern the institution of criminal charges against plaintiff, and the Court finds the most closely analogous state action is malicious prosecution. Consequently, a one year statute of limitations applies. Hence, the statute of limitations bars this against defendants Hughes and Garlinger.

For the reasons set out above, the Court HOLDS that all of the motions to dismiss are meritorious; and, therefore, they are GRANTED.

This action is hereby DISMISSED. The Clerk of Court shall enter JUDGMENT for the defendants:

/s/ Joseph P. Kinneary

United States District Judge

UNITED STATES DISTRICT COURT
FOR
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Filed:

Jun. 14, 1982

Case Number C-2-79-483

Miguel A. Gargallo

vs

Franklin County Court of
Common Pleas, et al.

J U D G M E N T

This action came on for consideration before the Court. The Honorable Joseph P. Kinneary, United States District Judge, presiding. The issues having been duly considered and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED THAT: all of the motions to dismiss are granted. This action is dismissed. Judgment is for the defendants.

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Dated at Columbus, Ohio this 14th day
of June, 19 82.

JOHN D. LYTER, CLERK

By: Deputy Clerk

No. 82-3453

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed:
OCT. 20, 1983

MIGUEL GARGALLO,

Plaintiff-Appellant,

v.

O R D E R

FRANKLIN COUNTY COURT OF
COMMON PLEAS, DIV. OF
DOMESTIC RELATIONS, ET AL.,

Defendants-Appellees.

BEFORE: MARTIN AND CONTIE, Circuit
Judges; and PHILLIPS, Senior
Circuit Judge

The plaintiff has appealed from the
district court's judgment for defendants
in this civil rights action challenging
certain domestic relations proceedings
conducted in the Ohio courts. Briefs
have been filed and the matter is now
before the Court for consideration pur-

suant to Sixth Circuit Rule 9(a).

This Court has carefully considered the record and the briefs filed herein and has concluded that the plaintiff's claims, even when liberally construed as mandated by Haines v. Kerner, 404 U.S. 519 (1972), were insufficient to entitle him to relief under the federal civil rights statutes. The Court further concludes that the district court was correct in determining that the plaintiff's claims presented domestic relations issues more appropriately considered by the state courts. See Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978); Firestone III v. Cleveland Trust Co., 654 F.2d 1212 (6th Cir. 1981).

Therefore, this panel having agreed unanimously that oral argument is not needed, Rule 34(a), Federal Rules of

Appellate Procedure.

It is ORDERED that the judgment of the district court is affirmed pursuant to Sixth Circuit Rule 9(d) (3).

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

Clerk